STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2005
v ERIC LAMARR PRINCE, Defendant-Appellant.	No. 249616 Wayne Circuit Court LC No. 02-012731

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v RAYMOND RANDOLPH WINGATE, Defendant-Appellant.	No. 249617 Wayne Circuit Court LC No. 02-012731-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KEITH LAMAR CLARK, JR., Defendant-Appellant.	No. 249618 Wayne Circuit Court LC No. 02-012731-01

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

The defendants in these three consolidated cases were all participants in the robbery of Popeye's Chicken on Eight Mile Road in Detroit on September 24, 2002, during which the manager, Marvin Bryant, was shot and killed. Defendants Eric Lamarr Prince, Raymond

Randolph Wingate, and Keith Lamar Clark, Jr., were all charged in connection with the robbery and murder, and the three defendants were tried jointly before a single jury in Wayne Circuit Court. Defendants Prince and Wingate were convicted of felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Clark was convicted of first-degree premeditated murder, MCL 750.316(1)(a), felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, and felony firearm, MCL 750.227b. Defendants Prince and Wingate were each sentenced to life imprisonment without the possibility of parole for the felony murder conviction and a consecutive two-year term for the felony firearm conviction. Defendant Prince was sentenced to eighteen years and nine months to forty-five years' imprisonment, and defendant Wingate was sentenced to 225 months to 45 years' imprisonment, for their robbery convictions. Defendant Clark was sentenced to concurrent terms of life imprisonment without the possibility of parole for the murder convictions, 225 months to 45 years' imprisonment for armed robbery, fifteen to forty-five years' imprisonment for the assault conviction, and a consecutive two-year term for felony firearm. All three defendants appeal as of right. We vacate the felony murder convictions and sentences pertaining to defendants Prince and Wingate and remand for a new trial on this charge, but affirm these defendants' convictions in all other respects. With regard to defendant Clark, we affirm his convictions and sentences, but remand for the ministerial task of correcting the judgment of sentence.

The robbery at Popeye's Chicken was described at trial by several employees working at the restaurant on the night in question. A cashier standing at the front counter testified that a man, whom she identified as defendant Clark, placed an order and asked for the manager. When Marvin Bryant approached, Clark jumped over the counter and pulled out a gun. Another man, identified by her as defendant Wingate, remained on the customer side of the counter, pulled out a long gun, pointed it to her head and demanded that she open the cash register. A third man wearing a mask and waving a small gun then entered the restaurant. The cashier took the till out of the register, put it on the counter, and Wingate removed the money. Defendant Clark demanded that Bryant open the safe, and then shot him several times when he stated that he did not know the combination. At that point, the cashier and a coworker were on the floor near the drive-through register. Clark shot at them twice, but they were not struck by the bullets. The other two men yelled "come on," Clark jumped back over the counter, and the three suspects left the premises. The employees then called 911.

The medical examiner that performed an autopsy on the victim testified that the victim died from multiple gunshot wounds, one of which was immediately fatal. The parties stipulated that a firearms expert would have testified that all of the 9 millimeter spent cartridge casings at the scene were fired from the same weapon; all of the bullets at the scene, as well as those removed from the victim's body, were 9 millimeter bullets fired from the same weapon, a semi-automatic weapon such as a MAC 10 or MAC 11. A dive team searched for a weapon reportedly discarded from the pier on Belle Isle,[1] but did not locate a weapon. In addition to the

[1] In his statement to police, defendant Clark stated that he discarded his weapon in that location after the robbery/homicide.

testimony of other witnesses, a videotape of the incident taken from the surveillance camera at Popeye's and a tape of the 911 call to police were played to the jury during the trial. In custodial statements made to the police, which were admitted into evidence and read to the jury at the joint trial, each of the defendants admitted involvement in the incident and implicated the other defendants.

Docket No. 249616 – Defendant Prince

I

On appeal, defendant Prince first argues that his constitutional right to confront the witnesses against him was violated by the admission at the joint trial of the custodial statements to police of the non-testifying codefendants, Clark and Wingate. US Const, Ams VI, XIV; Const 1963, art 1, § 20. We review a trial court's decision to admit evidence for an abuse of discretion and underlying questions of law de novo. *People v Shepherd*, 263 Mich App 665, 667; 689 NW2d 721 (2004).

Recently, in *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1374; 158 L Ed 2d 177 (2004), the United States Supreme Court held that testimonial statements by a non-testifying witness are admissible against a criminal defendant only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. See also *People v Bell (On Second Remand)*, 264 Mich App 58, 61; 689 NW2d 732 (2004); *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004). Although the *Crawford* Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,'" *Crawford, supra*, 124 S Ct at 1374, it held that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.* at 1364. See also *Bell, supra* at 62. In rendering its decision, the *Crawford* Court overruled its prior holding in *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), which had deemed admissible such hearsay evidence provided it met the requirements of a firmly rooted hearsay exception or that it bore particularized guarantees of trustworthiness.

Although the trial court herein did not have the benefit of the *Crawford* decision, which was issued after defendant's trial, this Court has held that *Crawford* applies retroactively to cases, such as the instant case, that were pending at the time it was decided. *Bell, supra* at 62. Here, the codefendants' custodial statements to police regarding the robbery and murder, and inculpating defendant Prince, were read into the record at trial. These statements were clearly "testimonial" in nature. *Crawford, supra*. Moreover, codefendants Wingate and Clark invoked their Fifth Amendment privileges not to testify at trial, rendering them "unavailable" witnesses and foreclosing any opportunity for defendant Prince to cross-examine them. *Id.* Consequently, as the prosecution concedes, the admission of the codefendants' statements violated defendant Prince's constitutional right of confrontation pursuant to *Crawford* and constitutes error.

However, the denial of the constitutional right to confrontation is subject to a harmless error analysis. *Bell, supra* at 63; *McPherson, supra* at 131; *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). With regard to a claim of preserved constitutional error, this Court must determine if the beneficiary of the error, the prosecution, has established that the error is harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *Bell, supra* at 63. The primary reason justifying the suppression of statements made by a

non-testifying codefendant at a joint trial is that "statements made by codefendants are often suspect because the declarant is motivated to shift blame." *People v Frazier (After Remand)*, 446 Mich 539, 544-545; 521 NW2d 291 (1994) (opinion by Brickley, J.). "In a joint trial, when a jury hears a codefendant's powerfully incriminating statement that expressly names the defendant and describes the defendant's role in the crime, the risk is that the jury will consider the codefendant's statement in assessing the guilt of the defendant despite an instruction telling it not to do so." *Id*. at 545, citing *Bruton v United States*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968).

In the case at hand, however, the admission of the codefendants' statements was harmless beyond a reasonable doubt with regard to defendant Prince's armed robbery conviction. Although the statements of codefendants Wingate and Clark implicated defendant Prince in the robbery and ensuing homicide, defendant's own confession, which was read into the record at trial, makes these statements largely superfluous to an assessment of his guilt on the charge of armed robbery. While he disclaimed any intent to harm the victims, defendant Prince acknowledged in his statement that he participated in the armed robbery. Further, the testimony of witnesses Felicia Lloyd and Arthur Prince likewise incriminated defendant and reinforced defendant's own admission that he participated in the robbery. Thus, in light of this evidence, the prosecution has adequately demonstrated that the *Crawford* error is harmless beyond a reasonable doubt and provides no basis for overturning defendant's conviction and sentence for armed robbery.

However, we cannot reach the same conclusion with regard to defendant Prince's felony murder conviction. The non-testifying codefendants' statements were very prejudicial because they substantially incriminated defendant Prince in the homicide and shifted blame to him, in a manner that substantially and substantively differed from his own statement and the admissible evidence against him. In his statement, codefendant Wingate claimed that defendant Prince was the principal instigator of the crime, which was purportedly planned at Prince's home, that defendant Prince wore a mask during the offense, and that defendant Prince carried a .38 revolver. In his confession, codefendant Clark also alleged that the crime was planned at defendant Prince's home, that Wingate said he and Prince wanted to "hit a lick" (which meant commit a robbery), and that Prince carried a pistol.

By contrast, in his statement to police, defendant Prince acknowledged participating in the robbery, yet disclaimed any intention to harm the victim and, indeed, expressed surprise that codefendant Clark shot the store manager. One of defendant Prince's theories advanced at trial was that he was not one of the robbers, but rather was the driver who never got out of the car. It was only by virtue of the admission of Clark's statement that the jury learned that the driver was 5' 10" tall with braids, in contrast to defendant Prince, who was described as being short with an Afro haircut. Clark and Wingate were seen on the videotape and identified by eyewitnesses, whereas the third suspect wore a mask over his face and was not identified, except for a witness' account that a third suspect was smoking outside the front door of the restaurant. There was no viable DNA analysis of the cigarette butts seized from the location, and no fingerprints connected defendant to the scene.

Consequently, as conceded by the prosecution, the codefendants' statements each supplied details about the crime which defendant's statement did not – and some of these not only undercut the proffered defense, but also supplied evidence of the requisite element of

malice and supported the prosecution's theory that the murder was hardly the unforeseen consequence of the robbery, as defendant claimed. If the codefendants' statements had been excluded under *Crawford*, the jury would not have heard these untested assertions by the codefendants. See *Frazier, supra*; *Carines*, *supra* at 759 ("It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for an unforeseen death that did not result from actions agreed upon by the participants."). We conclude, with regard to defendant Prince's felony murder conviction, that the *Crawford* error was not harmless beyond a reasonable doubt. We therefore vacate the felony murder conviction and remand for a new trial on that charge.

II

Defendant Prince next argues that the trial court erred in denying his motion to suppress his custodial statement. He maintains that the statement was coerced and was elicited in violation of his Fifth Amendment right to counsel. We disagree.

The voluntariness of a confession is a question for the trial court. *People v Robinson*, 386 Mich 551, 558; 194 NW2d 709 (1972). This Court must examine the entire record and make an independent determination of voluntariness. *Id*. We review a trial court's findings of fact made at a *Walker*[2] hearing for clear error. *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001); *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000); *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). "'[B]ecause the demeanor of witnesses and credibility are so vitally important to a trial court's determination,' this Court gives deference to the trial court's credibility determination at a *Walker* hearing." *People v Kimble*, 252 Mich App 269, 273; 651 NW2d 798 (2002), aff'd 470 Mich 305 (2004), quoting *People v Snider*, 239 Mich App 393, 418; 608 NW2d 502 (2000). To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

A custodial statement obtained from a defendant is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *Daoud*, *supra* at 632-639. A confession or waiver of constitutional rights must be the product of an essentially free and unconstrained choice by its maker and must be made without intimidation, coercion, or deception. *Id*. at 633; *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). Whether a statement is deemed voluntary under the Fourteenth Amendment is to be determined by a totality of the circumstances analysis using certain non-exclusive enumerated factors as guidelines. See *Cipriano*, *supra* at 333-334. The prosecution has the burden of establishing a valid waiver by a preponderance of the evidence. *Daoud*, *supra* at 634.

[2] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

As a general rule, "[a]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982), quoting *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). See also *People v Harris*, 261 Mich App 44, 54; 680 NW2d 17 (2004); *People v Kowalski*, 230 Mich App 464, 478; 584 NW2d 613 (1998).

Defendant first contends that his statement was obtained in violation of his Fifth Amendment right to counsel, as this Court has construed it in *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996). In *Bender*, our Supreme Court considered whether, under Michigan law, a suspect's waiver of his rights to remain silent and to counsel is valid when the police fail to inform him, before he gives a statement, that a specific, retained attorney is immediately available to consult with him. The *Bender* Court held that "Const 1963, art 1, § 17 requires the police to inform the suspect that a retained attorney is immediately available to consult with him, and failure to so inform him before he confesses per se precludes a knowing and intelligent waiver of his rights to remain silent and to counsel." *Id.* at 597.

Here, defendant testified at the *Walker* hearing that when he voluntarily turned himself in at the police station, he was advised by his attorney that he should not make a statement, and he heard his attorney tell the investigating officer that he would not be making a statement. Defendant testified that he personally told the officer that he did not want to speak. However, defendant stated that, in blatant disregard for his clear invocation of the right to silence and inquiries as to the whereabouts of his attorney, the officer continued to question him about the offense and told him that, unless he talked, he would get life in prison and would never see his children again. The officer also purportedly told defendant that his attorney had abandoned him. Defendant now argues that these tactics devastated him and undermined his freewill to the extent that his waiver of rights and his confession cannot be regarded as voluntary.

Defendant's attorney testified at the *Walker* hearing that he was retained to represent defendant throughout the initial phases of the case and that he accompanied defendant to the police station to turn himself in to the authorities. The attorney stated that he identified himself to defendant's interrogating officer, gave him a business card, and "tried to relate to [the officer] . . . that if my clients decided to make a statement, then so be it. But there would be no statements made or any discussions or any interrogation without me being present." The attorney testified that defendant was then taken to an interrogation room apart from the attorney, who was thereafter "blocked out of the process."

However, the trial court, giving credence to the experienced investigating officer's version of events, found that, following standard booking procedures, defendant reinitiated contact with the police by remarking to the officer, "I'm in trouble," after which the interrogating officer confirmed that defendant wished to discuss the case, gave defendant *Miranda* warnings, and had defendant sign and initial the waiver form. Defendant then voluntarily gave his statement. The officer testified that defendant, who had previous experience with the police,

never expressed confusion about his rights, never asked him to cease the questioning, and never asked for his attorney while giving his statement.[3] Giving due deference to the trial court's superior opportunity to weigh the credibility of the witnesses and conflicting evidence introduced at the *Walker* hearing, *Kimble, supra* at 273, we find no clear error in the trial court's finding that defendant reinitiated contact with the police and was thus subject to further interrogation. The court aptly noted that Fifth Amendment rights are not self-executing and must be claimed personally, not vicariously through an attorney. See *Moran v Burbine*, 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986). Under the circumstances, the evidence demonstrates defendant himself "initiate[d] further communication, exchanges or conversations with the police," *Paintman, supra* at 525, so as to permit further interrogation without intruding on his right to silence and to counsel. *Bender, supra*.

Moreover, the totality of the circumstances indicate that defendant's statement was voluntarily, knowingly, and intelligently rendered. *Cipriano, supra* at 334. In denying defendant's suppression motion, the trial court considered, on the record, each of the *Cipriano* factors measuring voluntariness, *id*., and noted that defendant was "very articulate" and no stranger to the criminal justice system. The *Walker* hearing testimony indicated that defendant was twenty-seven years old, had prior experiences with the police, was not under the influence of any intoxicants or mental impairments, and was never deprived of food or drink during the course of the interview. The interrogating officer testified that he made no promises of leniency to induce the statement and did not employ any lies or trickery. The officer testified that defendant never asserted his rights or asked to stop the questioning, never asked to speak to an attorney, and proceeded to make a statement of his own free will. While defendant's testimony was to the contrary, the trial court was in a superior position to weigh the credibility of the conflicting evidence, and there is no basis in the record to overturn the trial court's conclusion that defendant's statement was voluntarily rendered. *Kimble, supra* at 272-273. Accordingly, defendant's claim is without merit.

III

Defendant lastly maintains that his convictions and sentences for both felony murder and the underlying felony, armed robbery, violate the state constitutional prohibition against double jeopardy. See *People Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981); *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). However, in light of our conclusion that defendant's felony murder conviction and sentence must be vacated on the basis of a violation of *Crawford,*

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[3] The officer also testified that before he gave his statement, defendant asked if his attorney was still in the police station, to which the officer replied:

> I don't know. I can look for you if you want me to. And he [defendant] said no. Never mind. I didn't pay for him. He probably left anyway.

The officer testified that he actually looked on the fifth floor to see if the attorney was still around, but did not see him anywhere. He then advised defendant of his *Miranda* rights, and defendant signed and initialed the advice of rights form.

supra, and a new trial granted on this charge, this claim is moot. See *Ardt v Titan Ins Co*, 233 Mich App 685, 693; 593 NW2d 215 (1999) ("This Court need not address issues that have become moot.").

Docket No. 249617 – Defendant Wingate

I

In his first issue, defendant Wingate, like codefendant Prince, alleges a violation of the rule set forth in *Crawford v Washington, supra*. Defendant Wingate maintains that the admission of the custodial statements of the non-testifying codefendants (Prince and Clark) at the joint trial, which implicated defendant in the robbery and murder, violated his Sixth Amendment right of confrontation because their statements were "testimonial" in nature, the codefendants were unavailable witnesses in light of the invocation of their Fifth Amendment right against self-incrimination, and defendant had no opportunity to cross-examine them. We agree, and the prosecution concedes, that constitutional error occurred.

Nonetheless, using the same harmless error analysis set forth in our discussion of this issue as it pertained to codefendant Prince, see text *supra*, we conclude that the *Crawford* error does not warrant reversal of defendant's conviction for armed robbery. *Bell, supra; McPherson, supra*. The error was harmless beyond a reasonable doubt, given defendant's own admissible confession, in which he admitted to planning and participating in an armed attack for the purpose of robbing the victim, and the admission into evidence of the videotape, which captured the entire incident, including defendant's participation in the robbery. Defendant's armed robbery conviction therefore remains viable under a harmless error analysis.

However, as the prosecution concedes, the harmless error analysis does not salvage defendant's felony murder conviction. While defendant Wingate admitted in his statement that he helped plan and participate in the robbery, he further claimed that an unloaded shotgun was already in the car when he got in, that he didn't want any part of the shooting, and that he wanted to leave the scene. On the other hand, the codefendants' statements supplied exclusive details of defendant Wingate's participation that enhanced his culpability. Certain details, such as Prince's statement that defendant fired the shotgun into the air after codefendant Clark discharged his first two gunshots into the store manager's legs, directly undermined the proffered defense and bolstered the prosecution's theory that the murder was hardly the unforeseen consequence of the robbery, as defendant claimed. Because defendant Wingate did not have the opportunity to cross-examine the codefendants concerning these statements implicating him and contradicting his own statement regarding the fatal shooting, the *Crawford* error was not harmless with respect to his conviction for felony murder. We therefore vacate defendant's conviction and sentence for felony murder and remand for a new trial on that charge.[4]

[4] In light of our disposition of this issue, defendant's separate appellate claim that there is insufficient evidence to support his felony murder conviction is rendered moot. *Ardt, supra*.

II

Defendant Wingate also argues that he was denied a fair trial by prosecutorial misconduct. Defendant contends that the prosecutor unfairly insinuated that he was dangerous by introducing testimony that defendant was arrested at his job as a result of an anonymous tip and by inferring that the anonymous call was made out of fear of retaliation or intimidation. Defendant further cites the prosecutor's comment in his opening statement that the victim was "begging for his life," purportedly providing inflammatory commentary to the videotape of the incident. We disagree.

Because defendant failed to object to the prosecutor's comments, this issue is not properly preserved for review and is subject to a plain error analysis. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford, supra*. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.* at 721. Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995).

Here, defendant has failed to demonstrate plain error affecting his substantial rights. Prosecutors may not make a statement to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *Schutte, supra* at 721. The prosecutor need not state his argument in the blandest possible terms. *Id*. at 722. In the instant case, the prosecutor's innocuous comments were not improper, but fell well within the permissible scope of argument based on the evidence and the reasonable inferences arising from it. Defendant's argument is without merit.

III

Defendant Wingate next argues that the trial court erred in admitting as evidence gruesome and inflammatory photographs of the victim and an emotional 911 tape. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Specifically, "[t]he decision to admit or exclude photographs is within the sole discretion of the court." *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified and remanded 450 Mich 1212 (1995). As long as the evidence is pertinent to help establish an element of the crime, or illuminate some facet of the case for the trier of fact, its graphic nature does not render it inadmissible. *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972). Photographs need not be excluded merely because a witness can testify about the information contained in the photographs; photographs may also be admissible if they corroborate a witness' testimony, and gruesomeness alone will not cause their exclusion. *Id.; Mills, supra* at 76. The proper inquiry is whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Mills, supra* at 75. Courts should exclude photographs under MRE 403 if they may lead a jury to abdicate its truth-finding function and convict due to passion. *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991).

In this case, the photographs in question, as well as the 911 tape, were relevant on several grounds: this evidence corroborated eyewitness' accounts of the shooting, illustrated the nature

of the wounds suffered by the victim, and underscored that such wounds were severe enough to permit an inference of malice, an essential element of felony murder. *Carines, supra* at 758-759. The fact that the photographs of the victim's injuries were somewhat gruesome, i.e., showed wounds to the back of the victim's head, is insufficient to preclude the evidence, where such evidence served a proper purpose, and its probative value was not substantially outweighed by unfair prejudice. *Mills, supra*. Defendant has failed to meet the "heavy burden" of showing that the challenged evidence should have been excluded as unfairly prejudicial. *People v Houston*, 261 Mich App 463, 467-468; 683 NW2d 192 (2004).

Docket No. 249618 – Defendant Clark

I

Defendant Clark first argues that he was denied his constitutional rights against self-incrimination and to due process when the police extracted two statements from him without notifying his attorney, knowing that he was represented by counsel and that they were to call that attorney if defendant decided to make a statement. Defendant maintains that the instant case is analogous to *Bender, supra*, in which the Michigan Supreme Court held that the failure to inform a suspect that an attorney is available before a confession is obtained per se precludes a knowing and intelligent waiver of the rights to remain silent and to counsel. Defendant contends that, although his attorney, who accompanied defendant when he surrendered to authorities, left police headquarters after talking to the investigating officer, he gave the officer his business card containing his office, pager, and cell telephone numbers; the officer knew that the attorney represented defendant and was available if defendant made a statement; and, the officer did not call the attorney when defendant made his statement. Defendant argues that he invoked his right to counsel when his attorney came with him to the police station, and that he should not have been subject to further interrogations because the officer did not make the attorney available to him.

At the *Walker* hearing, defendant Clark's attorney testified that he accompanied defendant and codefendant Prince to the police station, where both defendants surrendered to authorities. The attorney gave his business card to the investigating officer and purportedly told the officer that there would be no statements made or any interrogation without him being present. He was then separated from the defendants, who were taken to different interrogation rooms, and he was thereafter allegedly "blocked out of the process."

Defendant Clark testified at the *Walker* hearing that he was initially advised of his *Miranda* rights by the investigating officer. He admittedly signed and initialed the advice of rights form. He was then taken to an interrogation room, where he was purportedly told by the officer "that if I didn't make a statement, that I wouldn't be able to talk during trial and people would be looking at me like I'm guilty." The officer also allegedly told defendant "that my lawyer said that he wasn't representing me because the case was too spiritual, he was too spiritual for the case, I mean." Defendant testified that the officer informed him that codefendant Wingate had made a statement against him, and that it would be to his benefit to make a statement. The officer advised defendant of his *Miranda* rights and began questioning defendant, who then gave his statement in response to the officer's questions. Defendant admitted that he was not intoxicated at the time, was not deprived of food, was in good physical condition, and had prior contact with the criminal justice system. He further acknowledged that,

even though he was advised by his attorney not to make a statement, he nonetheless proceeded to do so.

The investigating officer testified at the suppression hearing that, when he interrogated defendant Clark, there were photographs from the videotape of the crime scattered around the room. Defendant Clark, looking at the photographs, spontaneously remarked that "I'm not the killer they make me out to be" and then proceeded to give a statement, after being advised of his *Miranda* rights. The following day, after defendant requested to speak to the officer again, he made another statement, which was preceded by *Miranda* warnings. The officer disavowed defendant's version of the circumstances surrounding his confession and testified that defendant never requested that an attorney be present before he spoke to him.

In our review of the record of the *Walker* hearing to determine the admissibility of defendant's custodial statements, we must give ample deference to the trial court's credibility determinations. *Kimble, supra* at 272. Accepting, as the trial court did, the veracity of the seasoned police officer's account of events, and even considering defendant Clark's version of events, there is no discernible violation of defendant's right to counsel under *Bender, supra*. We conclude that the trial court's findings were not clearly erroneous, and, on review de novo, we conclude that, based on these factual findings, defendant voluntarily initiated contact with the interrogating officer for the purpose of discussing the incident in question and thereafter effectively waived his *Miranda* rights and willingly gave his statements. The totality of the circumstances surrounding the making of defendant's statements, when examined pursuant to the standards set forth in *Cipriano, supra*, indicate that the statements were freely and voluntarily made. Defendant's argument is therefore without merit.

II

Defendant Clark next argues that the trial court erred in denying his pretrial motion to suppress the introduction of codefendants Prince's and Wingate's custodial statements into evidence in this joint trial before a single jury. Defendant notes that the codefendants' statements directly inculpated defendant as the suspect who shot the store manager, while minimizing their own involvement in the offenses. Defendant contends that, because he had no prior opportunity to cross-examine the unavailable codefendants regarding their testimonial statements, he was deprived of his constitutional right of confrontation under *Crawford v Washington, supra*. We agree. However, we further conclude that the error in the admission of this evidence is harmless beyond a reasonable doubt. *Bell, supra* at 63; *McPherson, supra* at 131. At trial, eyewitness testimony and a videotape of the incident were introduced, identifying defendant as the suspect who shot the store manager. Moreover, while the codefendants in their statements also directly identified defendant Clark as the shooter, defendant's own statement corroborated all facts which the codefendants' statements supplied. Defendant confessed not only to the robbery in question, but also to firing the fatal shots. In one of his statements, defendant Clark admitted:

> I jumped the counter and I seen the manager by the safe. I told him to open the safe. He started moving around like he was getting ready for something. I got nervous and a thousand thoughts was going though my mind. I felt like he was getting ready to hurt me. That's when I started shooting at him. I don't remember how many times I shot. I jumped over the counter and then ran out.

That's all I remember.

Given the abundant admissible evidence that established defendant Clark as the shooter, including positive identification by an employee who was an eyewitness to the robbery and shooting, the prosecution correctly argues that the codefendants' statements are cumulative to the other admissible evidence presented at trial. Consequently, we conclude that the error in the admission of the codefendants' statements was harmless beyond a reasonable doubt under the facts of this case and provides no basis for overturning defendant Clark's convictions.

III

Intertwined with the issue of the admissibility of his codefendants' statements at the joint trial is the issue whether the trial court improperly denied defendant Clark's motion for severance of his trial. In a pretrial motion, defendant specifically argued that, because the trial court concluded that the codefendants' confessions would be admissible against him at trial, he was entitled to have a separate jury. The trial court denied defendant's motion. Defendant now contends that he was denied a fair trial because the trial court refused to seat a jury separate from that of his codefendants. We disagree.

"Whether to hold separate trials is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent an abuse of that discretion." *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993); see also MCL 768.5. A defendant does not have an absolute right to a separate trial. *Id*. at 152. "A strong policy favors joint trials in the interest of justice, judicial economy, and administration." *Id.* The trial court must sever the trial of multiple defendants on related offenses on a showing that severance is necessary to avoid prejudice to a defendant's substantial rights, MCR 6.121(C), and that severance is the necessary means of rectifying potential prejudice. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994). Accordingly, neither a disparity of proofs nor blame-shifting defenses will justify severing codefendants' trials, since the desired result is not the most favorable result possible for an individual defendant, but rather a true and accurate verdict for all concerned. *Id*. at 350. The defendants' defenses must be not only inconsistent, but must be antagonistic, mutually exclusive, or irreconcilable. *Id*. at 343-350.

Defendant has made no showing of mutually exclusive or antagonistic defenses. "[A] confession is not 'antagonistic' for the purposes of determining whether to sever a trial where . . . the confession of a codefendant incriminates both the codefendant and defendant." *People v Jackson*, 179 Mich App 344, 349; 445 NW2d 513 (1989), vacated in part on other grounds 437 Mich 866 (1990). Thus, defendant has failed to demonstrate that the trial court abused its discretion in denying his motion for severance.

IV

Finally, with regard to defendant's meritorious claim of a ministerial error in the judgment of sentence, where a judgment of sentence misstates the crime for which the defendant was convicted, the proper remedy is to remand for correction. *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999). A remand to the trial court is therefore warranted in this case for the limited purpose of correcting the judgment of sentence to accurately reflect defendant's conviction and sentence for assault with intent to do great bodily harm less than murder.

Conclusion

In sum, in Docket Nos. 249616 and 249617, we vacate defendant Prince's and defendant Wingate's convictions and sentences for felony murder, and remand for a new trial on that charge, but affirm their convictions and sentences for armed robbery and felony firearm. In Docket No. 249618, we affirm defendant Clark's convictions and sentences in all respects, but remand to the trial court for the limited purpose of correcting the judgment of sentence to accurately reflect defendant's conviction and sentence for assault with intent to do great bodily harm less than murder. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio